UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/562
2 July 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 562

Case No. 552: AL-JAFF

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Samar Sen; Mr. Hubert Thierry;

Whereas, on 28 March 1990, Mohammed A. Al-Jaff, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 31 May 1990;

Whereas in the pleas of his application, the Applicant requests the Tribunal to:

"...

1. Rescind the decision of the Secretary-General to reject the unanimous recommendation of the Joint Appeals Board ..., namely,

> '(b) that the appellant be retroactively given a contract for one year, from 21 May 1989 to 21 May 1990, for which he had legal expectancy, and that the period from 21 May 1989 to the date upon which he resumes his service, be deemed special leave with pay',

or, in other words, the Secretary-General's decision to terminate the Applicant's appointment;

2. Decide that the Secretary-General's decision to terminate Applicant's appointment, in spite of the unanimous Joint

Appeals Board recommendation, contradicts the assurances repeatedly given by the Under-Secretary-General for Administration and Management on behalf of the Secretary-General... :

> 'just over a year ago, the decision was taken that the Secretary-General would accept all unanimous reports of the Board provided they do not impinge on major questions of law or principles';

...

3. To order the implementation of the Joint Appeals Board's recommendation contained in paragraph 51 (b) of its report and, consequently, the immediate reinstatement of the Applicant as from 21 May 1989;

4. Alternatively, in lieu of specific performance, to order him to pay instead the Applicant as compensation, the sum equivalent to five years base salary."

Whereas the Respondent filed his answer on 14 December 1990;

Whereas the Applicant filed written observations on 13 March 1991;

Whereas on 4 June 1992, the Tribunal put a question to the Respondent and he provided an answer thereto on 10 June 1992;

Whereas on 11 June 1992, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Economic and Social Commission for Western Asia, hereinafter referred to as ESCWA, on 22 May 1984, as a Security Officer at the GS-4, step I level. He was initially offered two successive fixed-term appointments of three and nine months respectively, until 21 May 1985.

In December 1984, the Applicant was suspended with pay, pending the investigation of an incident in which he was accused of attacking another staff member. After reviewing the report of the Committee constituted to investigate the charges, the Chief of Staff Services at Headquarters instructed the Acting Chief, Division of Administration, to lift the suspension because the report did not provide conclusive evidence that the Applicant was guilty of the offence with which he had been charged. The Office of Personnel Services, therefore, could not support, on the basis of the information available, termination of the Applicant's appointment for serious misconduct.

In a memorandum dated 14 March 1985, the Acting Chief of Administration advised the Applicant that he could resume his duties, but also warned him that the Administration would closely observe and evaluate his work performance in order to determine whether he would continue serving ESCWA. The Applicant would be advised of the decision at the appropriate time.

The Applicant's performance during the period 22 May 1984 through 21 May 1985, was rated as "fair". His appointment was then extended for two successive periods of three months and six months, through 21 February 1986. The Applicant's performance during the period 22 May 1985 through 21 May 1986, was rated as "a good performance" and he was then offered a one-year fixed-term appointment through 21 August 1987.

In a performance evaluation report dated 19 February 1987, the Applicant's overall performance during the period 22 May 1986 through 28 February 1987, was rated as "a good performance". However, the Acting Chief, General Services Section, commented that the Applicant "lacks the sense of tact and good judgement in conducting his duties".

The Applicant instituted a rebuttal procedure against the report and the panel constituted to investigate the rebuttal found in his favour. However, in his appraisal of the report, the Executive Secretary upheld the gradings and comments by the First and Second Reporting Officers. The Applicant's appointment was then extended successively for further short-term periods, through 31 December 1987, 31 March, 30 June and 31 December 1988.

In a performance evaluation report dated 11 April 1988, for the period 1 March 1987 through 29 February 1988, the Applicant received 11 "C" (Good) ratings and 2 "D" (Fair) ratings in written and oral English. His overall performance was rated as "Good".

On 2 November 1988, the Applicant wrote to the Acting Chief, General Services Section, asking to be considered for a career appointment, particularly in view of the fact that he would reach the age of 50 on 1 April 1989 and would, therefore, be inelegible for such an appointment after that date. On the same day, the Acting Chief, General Services Section, informed the Applicant that he would be advised of the status of his employment with ESCWA before the expiration of his current appointment on 31 December 1988.

In a letter dated 30 November 1988, the Chief, Personnel Section, informed the Applicant that the Executive Secretary, in accordance with staff rule 109.7, had decided not to extend his fixed-term appointment beyond

31 December 1988 and that he would be considered on special leave with pay with effect from 1 December 1988. According to the record of the case, this decision was based on a recommendation dated 30 November 1988, from the Acting Chief, General Services Section, to the Deputy Chief, Personnel Section, that the Applicant's performance "did not improve ... despite the many opportunities given to him." In his view, the Applicant "did not fulfil the requirement of good tact in dealing with the public" and had not demonstrated "a fair knowledge of the English language when acting as a point of contact on behalf of ESCWA". This communication was never copied to the Applicant.

On 27 December 1988, the Chief, Personnel Section, informed the Applicant that the Executive Secretary had decided, "for humanitarian reasons", to grant him a final three-month extension of his appointment, through 31 March 1989. The Applicant would not work with the Security Section but with the General Services Section.

On 13 February 1989, the Applicant asked the Secretary-General to review, under staff rule 111.2(a), the administrative decision not to extend his fixed-term appointment. On 28 May 1989, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 29 December 1989. Its conclusions and recommendations read as follows:

> "Conclusions and recommendations
>
> 48. The Panel first concludes that the two reasons given for the non-renewal of the appellant's fixed-term appointment were not borne out by the facts, nor properly motivated, and that, therefore, the appellant had a legal expectancy of renewal.
>
> 49. The Panel also concludes that the ESCWA Administration failed to communicate these reasons to the appellant, depriving him of his right to comment thereon, thus denying him due process.
>
> 50. The Panel further concludes that the ESCWA Administration did not make any attempt, notwithstanding its assurances to the contrary, to keep the appellant under contract to allow him to complete five years of service.
>
> 51. Therefore, the Panel recommends:
>
> (a) that the appellant be retroactively awarded a contract for one month and 21 days, from 31 March to

> 21 May 1989, in accordance with the proposal set forth in the memorandum of 5 April 1989 (...) in order to allow him to complete 5 years of service, and that this period during which he was not permitted to work be regarded as special leave with pay; and
>
> (b) that the appellant be retroactively given a contract for one year, from 21 May 1989 to 21 May 1990, for which he had legal expectancy, and that the period from 21 May 1989 to the date upon which he resumes his service, be deemed special leave with pay."

On 5 March 1990, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's report and informed him that:

> "The Secretary-General has re-examined your case in the light of the Board's report and noted that you were exceptionally granted a final three-month extension of your fixed-term appointment for the period 1 January 1989 to 31 March 1989 for humanitarian reasons and that ESCWA notified you accordingly by letter of 30 November 1988. The Secretary-General further recalled that pursuant to staff rules 109.7(a) and 104.12(b) your fixed-term appointment expired automatically on its expiration date of 31 March 1989 and did not carry any expectancy of renewal or of conversion to any other type of appointment, as indicated in your Letters of Appointment, taking also into account your service record at ESCWA.
>
> Notwithstanding the above, the Secretary-General has decided, taking into account the entire circumstances of your case, to grant you retroactively a contract extension for one month and 21 days from 31 March 1989 to 21 May 1989 as special leave with full pay to allow you to complete five years of continuous service for pension purposes, in final settlement of your case, and to take no further action on the matter."

On 31 May 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's discretion not to extend fixed-term appointments may not be exercised when the Respondent gives the staff member a reasonable expectancy of continued employment.

2. The decision not to extend a fixed-term appointment may not be vitiated by improper motive or prejudice.

3. The Secretary-General is obliged to accept the unanimous recommendations of the Joint Appeals Board, since he himself decided, in order to reduce the backlog of cases in the Joint Appeals Board, to implement such recommendations, unless they impinged on major questions of law or principle.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of his fixed-term appointment.

2. The Applicant has not discharged the burden incumbent upon him to prove his allegation that the decision not to renew his fixed-term appointment was vitiated by prejudice and discrimination.

3. The decision to let the Applicant's fixed-term appointment expire was properly motivated.

The Tribunal, having deliberated from 4 June to 2 July 1992, now pronounces the following judgement:

I. The principal facts in this case are not in dispute. Before examining the plea of the Applicant that the Secretary-General's decision "to terminate the Applicant's appointment" on 21 May 1989, be rescinded, the Tribunal has to consider two important issues: first, whether at the time of expiry of the Applicant's fixed-term contract he had any legal expectancy for renewal or extension of that contract; and secondly, whether, and if so to what extent, the unanimous recommendation of the Joint Appeals Board (JAB) was binding on the Secretary-General.

II. As regards the legal expectancy for the renewal or extension of a fixed-term contract, it is common ground that such a contract "having an expiration date specified in the letter of appointment" automatically expires on that day and "does not carry any expectancy of renewal or conversion to any other type of appointment". Nevertheless, the question arises, whether, in this case, and in the light of the decisions taken by the Tribunal in numerous

cases where a legitimate right of extension or renewal has been asserted, the Applicant can be held to have established such a right, on the grounds that a legitimate expectancy of employment was created by the Respondent's actions.

III. The Tribunal has examined each of the grounds given by the JAB in favour of its conclusion that the non-renewal of the Applicant's fixed-term contract was not justified and that the Applicant had a legitimate expectation of renewal. The Tribunal has consistently taken the view that, in deciding the claim for renewal of a fixed-term contract, the totality of all the factors existing at the time should be taken into account as no single element may be decisive. In the present case, the Tribunal finds that there is nothing to substantiate the charge that the decision was motivated by prejudice or other extraneous factors, even though there are hints of different degrees of animosity against the Applicant. The Tribunal finds that, with so many people working together in the difficult conditions of Baghdad, personal likes and dislikes do sometimes develop as they did indeed in this case. They were taken into account by the Respondent but they did not amount to prejudice or bias when the decision not to renew the Applicant's contract was taken.

IV. The JAB concluded that the decision not to renew the Applicant's fixed-term contract was based on an unfavourable report on the Applicant prepared and sent on 30 November 1988, by the Acting Chief of General Services Section. This report reads in part: "the performance of Mr. Al-Jaff did not improve, as was expected recently, despite many opportunities given to him. Also, in performing his duties as a security officer, he did not fulfil the requirements of good tact in dealing with the public and has not shown a fair knowledge of the English language when acting as a point of contact on behalf of ESCWA". He recommended "in consultation with the Chief, Security Office and Safety Unit" that the Applicant's fixed-term appointment be allowed to lapse. The JAB "felt that ... had it not been for these two reasons, renewal would have occurred", and cited several other factors: i.e., that the report was "not borne out by the facts in the file", that the Applicant's performance has generally been good, that the complaint about the Applicant's knowledge of

the English language was irrelevant and finally, that although the Applicant was reportedly involved in several incidents, no action was or could be taken against him after an investigation of the facts. The Tribunal finds that the JAB's conclusion concerning the effect of the report sent by the Acting Chief, General Services Section, is speculative.

V. The JAB also found that the report of the Acting Chief, General Services Section, was not shown to the Applicant as required by administrative instruction ST/AI/292 of 15 July 1982. Although the difficulties relating to his general conduct and behaviour, as mentioned by the Acting Chief, General Services Section, were already known to the Applicant and had been commented upon at different times and on different occasions, in the Tribunal's view, this communication does indeed attract the provisions of ST/AI/292.

VI. The Tribunal has established in its jurisprudence that good performance by a staff member does not by itself create any legitimate expectation for renewal of any fixed-term contract. The General Assembly resolution asking for consideration for continued employment of holders of fixed-term contracts of five years or more is not applicable, as the Applicant had not completed five years of service; furthermore, such consideration does not imply that a staff member has a right to extension.

VII. In the light of these considerations, the Tribunal concludes that, while there was no legitimate expectation of renewal of the Applicant's fixed-term contract, there have been several irregularities and deficiencies surrounding the non-renewal of the contract.

VIII. On the second important issue in this case, namely the extent to which the Respondent is bound by the unanimous recommendations of the JAB, the Tribunal asked the Respondent to furnish the Tribunal with the "pertinent sections of reports of the Secretary-General to the Fifth Committee of the General Assembly, and action taken by the General Assembly, if any, on this question". The Tribunal then considered the Applicant's claim that unanimous

recommendations by the JAB must be implemented by the Respondent except when, in his opinion, they "impinge on major questions of law or principle." A detailed examination of the material sent by the Respondent indicates that, since 1987, the Secretary-General has implemented, in most cases, the unanimous recommendations of the JAB. In the Tribunal's view, the Secretary-General has only adopted a policy, from which he can depart. Thus, the relevant rules concerning the advisory nature of the JAB recommendations remain unchanged. The Tribunal notes the assurance given by the Secretary-General in his report to the General Assembly dated 28 October 1988, that, "Where the recommendation of a Board is rejected, reasons are given for the decision." (A/C.5/43/25).

IX. In this case, the JAB made two recommendations, both favourable to the Applicant - the first one, relating to the awarding of a contract for one month and 21 days in order to ensure that the Applicant was entitled to pension - was accepted. The second one, that "the [Applicant] be retroactively given a contract for one year, from 21 May 1989 to 21 May 1990, for which he had legal expectancy", was rejected. Despite the assurance given by the Respondent in A/C.5/43/25, no reason for this rejection was given.

X. The Tribunal has concluded that the Applicant's claim of legal expectancy has not been established and therefore the decision not to renew his fixed-term contract was in order, especially as no prejudice, bias and other extraneous factors have been found to tarnish the decision. The Tribunal finds also that the Secretary-General was within his rights to reject a part of the JAB recommendation, despite his assurances that he would, in principle, and, as a matter of practice, accept unanimous recommendations made by the JAB.

XI. Nevertheless, the Tribunal finds that in several instances the procedure followed by the Respondent in dealing with the Applicant has been faulty and has caused injury to him. He is therefore entitled to relief and the Tribunal assesses it at US$2,000.

XII. Accordingly, and in view of the above considerations, the Tribunal orders the Respondent to pay the Applicant the sum of US$ 2,000 (two thousand dollars).

XIII. All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Samar SEN
Member

Hubert THIERRY
Member

Geneva, 2 July 1992

R. Maria Vicien-Milburn
Executive Secretary